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No. 190

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRIEDA HERRMANN, TRUSTEE, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the district court (R. 55–56) is unreported. The original opinion of the court of appeals is reported at 256 F. 2d 871. The *per curiam* order of this Court remanding the case to the court of appeals (Pet. viii) is reported at 358 U.S. 332. The opinion of the court of appeals on remand (Pet. i–vii) is reported at 274 F. 2d 842.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1960 (Pet. ix). A timely petition for rehearing was denied on March 28, 1960 (Pet. xi).

The petition for a writ of certiorari was filed on June 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly construed a trust instrument under the applicable state law.

STATEMENT

This action was brought by respondent under § 17 of the Trading with the Enemy Act (40 Stat. 425, 50 U.S.C. App. 17) to compel the petitioner, as the trustee of an Idaho inter vivos trust, to turn over to respondent the trust property claimed as a consequence of a vesting order issued by him, as successor to the Alien Property Custodian under the Trading with the Enemy Act.

The facts, which were stipulated (R. 51–54), are as follows:

On March 30, 1946, an Idaho resident created a trust in Idaho, of which petitioner at all times here relevant was the sole trustee (R. 51–52). The settlor named fourteen persons, his nephews and nieces, as the beneficiaries of the trust and allocated to each a percentage share of the trust property (Par. 5, R. 12–13). The trustee was directed to make annual payments of the income with discretion, however, to withhold payment (Par. 2, R. 10). The provision governing the payment of principal provided (Par. 4, R. 11):

> In the event any of the named beneficiaries herein come to the United States, the trustees have the authority and the duty to pay over

> to said beneficiaries his share of the trust estate. Furthermore, in the event it is possible for the trustee to pay over to the named beneficiaries herein, at any time after the creation of this trust, the shares respectively going to each of said beneficiaries, they may do so; providing that said payment to said beneficiaries shall not be subject to confiscation by; or create sinews of war for any government antagonistic to the United States. * * *

If not sooner terminated, the trust was to terminate upon the death of the last of the named beneficiaries and the trust property was to be distributed "to the heirs of the bodies of said beneficiaries" (Par. 3, R. 10).

All of the named beneficiaries and their issue were, when the trust was created, nationals and residents of Germany (R. 51). Accordingly, on May 12, 1949, the respondent executed Vesting Order No. 13246 by which he vested in himself for the benefit of the United States all the interest in the trust of the named beneficiaries and of "the heirs of the body, names unknown," of such persons (R. 17–19, 52). Demands for delivery of the *res* having been rejected by petitioner (R. 52–53), respondent commenced this action (R. 3–9).

The district court held that, as a result of the vesting order, all the outstanding beneficial interests in the trust passed to and merged in respondent, the trust thereby terminated, and respondent became entitled to the trust property (R. 61–62). The court of appeals affirmed, holding that the interests of the beneficiaries, whether or not contingent future in-

terests, were "property" subject to the vesting authority granted by the Act. 256 F. 2d 871.

This Court granted the trustee's petition for certiorari, vacated the judgment, and remanded the case to the court of appeals "to consider whether, under the law of property of Idaho, it was possible, after the time of the making of the conveyance, for any person other than the named beneficiaries of the trust to acquire a property interest in it (other than through a named beneficiary), and, in the light of its determination as to this, to reconsider its holding that respondent was entitled to all the trust funds remaining in the hands of the trustee." 358 U.S. 332.

On remand, the court of appeals held that, under Idaho law, the right to the corpus of the trust had vested finally and irrevocably in the 14 named beneficiaries by the time the vesting order was issued in 1949, and hence that no other persons could acquire a property interest in the trust. It accordingly adhered to its original decision that the United States, having vested the interests of the named beneficiaries, was entitled to the trust estate. (Pet. i–vii.)

ARGUMENT

The Government's right to the corpus of the trust turns on two issues: (1) whether the vesting order was effective to vest the interests it purported to vest—namely, the interests of the 14 named beneficiaries and their then-living issue; and (2) whether, having acquired those interests, the United States was entitled to terminate the trust and receive the corpus or whether there remained other persons, whose inter-

ests were not vested, who continued to have an interest in the trust—such as the unborn issue of the named beneficiaries or the settlor. In its first opinion, the court of appeals expressly dealt only with the first issue, holding that the vesting order was effective whether or not, as claimed by petitioner, the interests taken were contingent. Presumably because of the failure to deal with the second issue, this Court vacated the judgment and remanded the case to the court of appeals to consider whether, under the law of Idaho, it was possible "for any person other than the named beneficiaries of the trust to acquire a property interest in it."

On remand, the court of appeals held that the right to the entire principal of the trust had, prior to the date of the vesting order, indefeasibly vested in the 14 named beneficiaries so that there remained no other outstanding interests in the trust, either in the contingent remaindermen (the heirs of the body of the named beneficiaries) or in the settlor. It construed the controlling provision authorizing payment of the principal to the named beneficiaries, if "it is possible for the trustee" to make distribution and the distribution would "not be subject to confiscation by; or create sinews of war for any government antagonistic to the United States"—as requiring the trustee to distribute the corpus once the stated conditions were satisfied.[1] Since by May 1949 it had become possible

[1] The question whether the trustee had discretion to withhold payment even though those conditions were met is not presented by the petition. Since the vesting order vested the interests not only of the named beneficiaries but also of all of

for the trustee to make the payments (*i.e.*, the assets were no longer frozen) and they would not be subject to confiscation by an antagonistic government, it followed that the named beneficiaries were then entitled to payment of the principal and that the rights of the contingent remaindermen had been extinguished by the failure of the contingency (nonpayment to the primary beneficiaries) to occur. Having acquired the interests of the named beneficiaries by the vesting order, the United States was in turn entitled to the principal.

Petitioner's contention that the gifts were contingent upon nonconfiscation by the United States as well as by "antagonistic" governments and hence failed, causing a reversion to the settlor, is without substance. The condition of the proviso is that the distribution "not be subject to confiscation by; or create sinews of war for any government antagonistic to the United States." While the punctuation is inartistic, the only possible object of the preposition "by" is "any government antagonistic to the United States." Petitioner's

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their issue then living (*i.e.*, all of the apparent remaindermen), that question would affect the ultimate distribution of the estate only if: (1) the named beneficiaries never came to this country and the trustee withheld payment until their deaths; and (2) the named beneficiaries were survived either (a) by issue born after the vesting order (who would be entitled to a proportionate share of the estate) or (b) by no issue (in which event there would be a reversion to the settlor). It is presumably because of the remoteness of those contingencies that petitioner does not present that question and has chosen to rely instead on the single argument, discussed below, that the vesting itself voided the trust and caused a reversion to the settlor.

reliance on a loose paraphrase of the proviso in the statement of facts in the court of appeals' first opinion[2] as the law of the case (Pet. 6-7) is frivolous. The paraphrase is subject to an interpretation consistent with the proviso, and in any event an inadvertent misstatement of fact in an opinion directed to other issues can have no binding force on later proceedings in which the matter is directly in issue.

CONCLUSION

The decision below, fully responsive to the mandate of this Court, turns solely upon a construction of the trust instrument under the applicable state law. It presents no issue appropriate for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

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JULY 1960.

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[2] "The trustees were also given the discretion to pay over to the designated beneficiaries their stated shares, in their discretion, if they should find that the gift, when paid, would not be subject to confiscation by any government nor create sinews of war for any government antagonistic to the United States." 256 F. 2d 871, 873.

[3] *I.e.*, by reading "antagonistic to the United States" as modifying "government" in both of the preceding clauses.